

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

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Competitive Post Office Box )  
Service Enhancements )  
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Docket No. MC2012-26

COMMENTS OF THE PUBLIC REPRESENTATIVE

(July 26, 2012)

I. INTRODUCTION

On July 12, 2012, the Commission issued a notice and order requesting comments on a Postal Service proposal to change the Competitive Post Office Box Service product.<sup>1</sup> The Public Representative submits these comments for the Commission's consideration.

As discussed in detail below, with respect to competitive products, one of the Commission's responsibilities is to safeguard fair competition. The Postal Service's proposal raises serious issues of unfair competition. Given these anticompetitive issues, the Public Representative urges the Commission to refrain from approving the proposed changes until those issues are resolved. The Commission should dismiss the

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<sup>1</sup> Notice and Order Concerning Elective Filing Regarding Post Office Box Service Enhancements, July 12, 2012 (Notice). This notice also appointed the undersigned Public Representative. *Id.* at 3.

Docket No. C2012-1 complaint without prejudice and allow the complainants to file a new complaint to examine these anticompetitive issues.

Below, the Public Representative first reviews the unusual procedural history leading to this docket. Second, these comments identify and explain the general public's interest in this docket. Third, the Public Representative discusses the Commission's responsibilities with respect to safeguarding fair competition. Fourth, these comments examine the anticompetitive issues that are raised by the Postal Service's proposal and other filings. Finally, the Public Representative addresses the procedural issues with this proceeding and explains why dismissing the Docket No. C2012-1 complaint without prejudice and allowing the complainants to file a new complaint is the best course of action for resolution of the anticompetitive issues.

## II. THIS DOCKET'S UNIQUE PROCEDURAL HISTORY

The procedural history giving rise to this docket is unique, and a review is necessary to understand the full ramifications of this proceeding. On March 15, 2012, the Associated Mail and Parcel Centers, *et al.* (AMPC *et al.*) filed a complaint in Docket No. C2012-1 with the Commission alleging, among other things, that the Postal Service improperly changed its competitive post office box product without necessary prior Commission approval.<sup>2</sup> On April 4, 2012, the Postal Service filed a motion to dismiss the proceeding claiming, among other things, that the issues raised in the complaint were already resolved in other proceedings.<sup>3</sup> On April 25, AMPC *et al.* filed an opposition to the Postal Service's Motion to Dismiss.<sup>4</sup>

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<sup>2</sup> Docket No. C2012-1, Complaint Regarding Postal Service Offering Enhanced Product for Competitive PO Boxes, March 14, 2012 (Complaint). As far as the undersigned Public Representative is aware, no Public Representative has been appointed to represent the interests of the general public in Docket No. C2012-1.

<sup>3</sup> Docket No. C2012-1, Motion of the United States Postal Service to Dismiss Complaint, April 4, 2012 (Motion to Dismiss).

<sup>4</sup> Docket No. C2012-1, Answer in Opposition to the Motion of the United States Postal Service for Dismissal of the Complaint, April 25, 2012 (Opposition to the Motion to Dismiss).

On June 13, 2012, exactly 90 days after the complaint was filed, the Commission issued an order granting in part and denying in part the Motion to Dismiss.<sup>5</sup> In the Order Resolving the Motion to Dismiss, the Commission states that “it is not clear whether the Complaint raises material issues of law or fact” and seeks to “hold[] the Complaint in abeyance pending” future submissions. *Id.* at 2, 14. At the Postal Service’s option, the Commission allowed it to file an “elective filing” in this docket, under 39 CFR 3020.30. *Id.* at 14.

On July 9, 2012, the Postal Service made its Elective Filing concerning the changes to the Competitive Post Office Box Service product pursuant to 39 CFR 3020.30 *et seq.*<sup>6</sup> On July 12, 2012, the Commission issued a Notice of the Postal Service’s Elective Filing which clarifies that this proceeding is “designed to provide the Commission with additional information to aid it its review of service enhancements that the Postal Service introduced at certain competitive post office box locations.” *Id.* at 2. The Notice also requested comments and reply comments from interested parties on the Elective Filing.

Thus, it appears that the Commission is attempting to resolve a complaint through a 39 CFR 3020.30 new product proceeding. This marks the first time that the Commission has ever attempted to follow this unique procedural approach. While this approach may have a preliminary appeal, such action raises other issues which are discussed in more detail below.<sup>7</sup>

### III. THE GENERAL PUBLIC'S INTEREST IN THIS DOCKET

The general public has a strong interest in ensuring that the Postal Service does not engage in unfair competition. As users of post office box services and private

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<sup>5</sup> Docket No. C2012-1, Order on Motion to Dismiss Holding Complaint in Abeyance Pending Further Proceeding, June 13, 2012 (Order Resolving the Motion to Dismiss).

<sup>6</sup> Response of the United States Postal Service to Order No. 1366, July 9, 2012 (Elective Filing).

<sup>7</sup> See *infra* sections V through VII.

mailboxes (PMBs), the general public is better off with greater competition in the competitive post office box market. Increased competition will result in greater service options, better service, and lower prices.

However, if the Postal Service is able to unfairly use its monopoly or status as a government entity to provide itself with a competitive advantage not available to its PMB competitors, the general public would be harmed. Such activities would be anticompetitive because the Postal Service would not be competing on the basis of price or service, but rather on the basis that its competitors are prohibited from offering certain services by law, regulation, or the improper use of the Postal Service's monopoly powers. If such action is allowed, it would disrupt the level playing field in the competitive PMB market and allow the Postal Service to use its unique position as a monopoly and regulator to unfairly drive its PMB competitors out of the market and leave the general public with less choice, lower quality services, and higher prices.

#### IV. THE COMMISSION'S RESPONSIBILITY TO SAFEGUARD COMPETITION

Under the Postal Accountability and Enhancement Act (PAEA), the Commission's price regulation authority is substantially limited for competitive products. The most important requirement is that the prices established by the Postal Service must cover the costs attributable to such products.<sup>8</sup> This ensures that the Postal Service's market dominant products do not subsidize its competitive products. *Id.* It also provides the Postal Service with pricing freedom for its competitive products. *Id.*

However, compliance with these criteria in 39 U.S.C. 3633(a) does not necessarily equate with fair competition or completely fulfill the Commission's responsibilities with respect to competitive products. As cautioned by the Department of Justice's Antitrust Division (DOJ) in a legislative hearing on a precursor bill to the PAEA, "[a]n important corollary to this structure [39 U.S.C. 3633(a)] is that the intent of the

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<sup>8</sup> 39 U.S.C. 3633. Competitive products collectively also must cover an appropriate share of institutional costs. *Id.*

legislation is to subject the Postal Service to the antitrust laws for activities related to non-monopoly products.”<sup>9</sup> A level playing field must exist for fair competition and the competitive marketplace to protect consumers from anticompetitive actions. DOJ further testified:

With respect to competitiveness and a level playing field, our goal in enforcing the antitrust laws and thinking about appropriate antitrust laws, is always to have competitors subject to the same scheme of laws and regulations.

By level playing field, I think what we generally mean is an equal opportunity to compete, not absolute equality in every characteristic. I would be hard pressed to think of an industry where every competitor had the same characteristics, the same borrowing power or the same quality of trademark. So I think the differences among competitors are inherent in competition, and it is the opportunities afforded to them that need to be level.<sup>10</sup>

Under PAEA, the Commission was entrusted with the responsibility of safeguarding a level playing field with respect to certain types of Postal Service anticompetitive activities.<sup>11</sup> The Federal Trade Commission, DOJ, and private party causes of action under the Federal antitrust statutes ensure that a level playing field exists with respect to other actions.<sup>12</sup> This case appears as though it may implicate these PAEA requirements.

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<sup>9</sup> *H.R. 22 – To Modernize the Postal Laws of the United States: Hearing Before the Subcomm. On the Postal Serv. Of the House of Rep. Comm. Gov. Reform*, 106 Cong. First Session 323 (1999) (H.R. 22 Hearing) (Department of Justice Antitrust Division statement).

<sup>10</sup> H.R. 22 Hearing at 325 (Department of Justice Antitrust Division testimony).

<sup>11</sup> See e.g., 39 U.S.C. 404a; see also H.R. 22 Hearing at 347 (Statement of Federal Express Corporation) (“Another provision of H.R. 22 would generally bar the Postal Service from competing in an area that it regulates or regulating an area in which it competes. This principle is very important and must be retained. We do not object to a Postal Service amendment that would, as we understand it, require the Postal Regulatory Commission to follow antitrust precedents developed by the Department of Justice and Federal Trade Commission rather than concocting its own unique brand or ‘postal antitrust’ law.”)

<sup>12</sup> See PAEA section 404.

V. THE FILINGS RAISE SERIOUS ANTICOMPETITIVE ISSUES THAT NEED TO BE RESOLVED PRIOR TO COMMISSION APPROVAL

The Postal Service's filings and other changes to the competitive post office box service product offering may be anticompetitive.<sup>13</sup> Pleadings filed by PMBs and their trade associations appear to allege that the PMB competitors have to adhere to certain requirements regarding their conduct as PMB providers that the Postal Service does not have to follow for its competitive post office box service product.<sup>14</sup>

In particular they claim that, unlike the Postal Service's competitive post office box service product, PMB providers have to follow certain Federal regulations including those issued by the Postal Service located in the Domestic Mail Manual (DMM) Part 508.1.8.<sup>15</sup> PMB competitors argue that certain of these Federal regulations and other similar requirements place the Postal Service in a more favorable position than PMB competitors are legally allowed to offer to their customers. PMB providers allege<sup>16</sup> that the Postal Service's competitive post office box service product allows mail recipients (1) free mail forwarding and (2) the ability to file a change of address form once their contract has ended with the Postal Service.<sup>17</sup> On the other hand, PMB providers assert that they are barred from offering such services by Federal regulations.<sup>18</sup> Additionally,

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<sup>13</sup> The Commission has suggested that a 39 CFR 3020.30 proceeding may be an appropriate venue to raise anticompetitive concerns. See e.g., Docket No. MC2009-19, Order Approving Addition of Postal Services to Mail Classification Schedule Product Lists, January 13, 2010 at 16-18.

<sup>14</sup> See e.g., Comments of Postal Center USA, July 18, 2012; see also Complaint at 13-14.

<sup>15</sup> The Domestic Mail Manual is part of the Code of Federal Regulations and is constructively located at 39 CFR Part 111. See 76 FR 48722 (August 9, 2011); 39 CFR Part 111.

<sup>16</sup> These examples are not an exhaustive list of the PMB providers' claims of unfair competition. However, they succinctly illustrate the PMB providers' concerns. Additional claims of unfair competition may be uncovered if discovery is allowed to commence in this or a subsequent proceeding. All of the information about the details of the competitive post office box service product offering is within the complete control of the Postal Service.

<sup>17</sup> See e.g., Comments of The UPS Store #4990, July 19, 2012.

<sup>18</sup> *Id.*

PMB providers also claim that Federal regulations require them to provide the Postal Service with their customer lists on a quarterly basis.<sup>19</sup>

If we assume that the PMB providers' allegations regarding unfair competition are true,<sup>20</sup> then the Postal Service may be in violation of 39 U.S.C. 404a, 401(2), 403(c), chapter 36 as well as Federal antitrust laws.<sup>21</sup> However, the Postal Service expressly denies these allegations and asserts that it does not enjoy an unfair competitive advantage over its PMB competitors.<sup>22</sup> These opposing positions appear to set up a dispute raising a material issue of fact or law that needs to be resolved before the Postal Service may offer its competitive post office box service product with the changes described in its Elective Filing. Accordingly, the Public Representative urges the Commission to refrain from approving the proposed changes to the competitive post office box service product until these unfair competition issues are resolved. The Public Representative believes that the best course of action is for the Commission to dismiss the Docket No. C2012-1 complaint without prejudice and allow the complainants to file a new complaint to examine these anticompetitive issues.

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<sup>19</sup> See e.g., Comments of Postal Center USA, July 18, 2012. This would be especially problematic in the sense that the Postal Service could use these customer lists to target PMB providers' customers. Customer names are not typically disclosed to competitors. See e.g., Docket No. CP2012-40, Request of the United States Postal Service to Add Parcel Select Contract 3 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, Attachment F at 7.

<sup>20</sup> At this juncture, there is not sufficient evidence in the record for the Public Representative to make a determination as to whether the PMB providers can prove these claims. As a result, the Public Representative believes that the most appropriate course of action is for the Commission to apply a "motion to dismiss" standard of review and "accept as true all of the factual allegations contained in the" filings. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Otherwise, it would be unfair and raise due process issues if PMB providers were required to prove their case at the current time in this proceeding, particularly since all of the information about the details of the competitive post office box service product offering is within the complete control of the Postal Service.

<sup>21</sup> Federal antitrust laws apply to the Postal Service. See Postal Accountability and Enhancement Act section 404. The Commission may not be the proper forum for adjudication of violations of the Federal antitrust statutes. However, violations of these other statutory provisions appear to fall within the Commission's purview under 39 U.S.C. 3662.

<sup>22</sup> See e.g., Elective Filing, Attachment B at 8 ("Thus, the Postal Service has not used its rulemaking authority to give itself a competitive advantage over PMB providers.").

## VI. THE PROCEDURAL QUAGMIRE

As discussed above, the anticompetitive issues giving rise to this case were originally alluded to in a complaint proceeding. Resolution in the context of a complaint proceeding has its advantages. First, the Commission's remedial authority is broad. If the Commission finds a complaint to be justified, it can "order the Postal Service [to] take such action as the Commission considers appropriate to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance." 39 U.S.C. 3662(c). A complaint proceeding also envisions a discovery process and exchange of information between the parties as a matter of course. 39 CFR 3030.1(b).

On the other hand, it is difficult to see what remedy the Commission could offer the PMB providers in the context of a 39 CFR 3020.30 proceeding. Such proceedings appear to envision the Commission either approving or disapproving a new product. No matter how much information the Postal Service files in support of its proposed changes, such disclosures are not going to ensure that the Postal Service does not have unfair competitive advantages in the mail box provider marketplace due to Federal regulations and other legal requirements. Additionally, 39 CFR 3020.30 proceedings do not typically involve discovery, the ability of PMBs to question the Postal Service, or the submission of PMB providers' evidence. Moreover, the Notice, the statute and the Commission's rules do not appear to contemplate that allegations of violations of 39 U.S.C. 404a, 401(2), or 403(c) are considered in such proceedings.<sup>23</sup>

The procedural status of Docket No. C2012-1 is also cause for concern. Section 3662(b) requires the Commission "within 90 days after receiving a complaint" to either (1) make a "finding that such complaint raises material issues of fact or law" and "begin proceedings on such complaint" or (2) "issue an order dismissing the complaint." 39 U.S.C. 3662(b)(1), (b)(1)(A). If the Commission does not choose one of these options

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<sup>23</sup> See Notice at 2. It also does not appear that the Commission would have authority in a 39 CFR 3020.30 proceeding to order a remedy to change DMM requirements. Such a remedy appears to be afforded in a complaint proceeding, however.



within that time period, the statute requires that complaint “shall be treated in the same way as if it had been dismissed.” 39 U.S.C. 3662(b)(1)(B). Because the Commission explicitly stated that “it is not clear whether the Complaint raises material issues of law or fact” in its Order Resolving the Motion to Dismiss issued exactly 90 days after the complaint was filed, an argument could be made that the Docket No. C2012-1 complaint has been dismissed by operation of law. Thus, if that argument were successful, any subsequent remedy afforded by the Commission to the PMB providers in Docket No. C2012-1 would be reversed by a reviewing court as *ultra vires*. Accordingly, the best course of action is for the Commission to dismiss the Docket No. C2012-1 complaint without prejudice and allow the complainants to file a new complaint to examine these anticompetitive issues.

#### VII. IN THIS CASE, A CHAIRMAN/COMMISSION INFORMATION REQUEST IS NOT A SUFFICIENT SUBSTITUTE FOR DISCOVERY

It has been general practice for the Commission or the Chairman to issue Information Request asking for additional information from the Postal Service in the context of 39 CFR 3020.30 requests, where the Commission believes that more information will aid in its ability to make its final determination on a Postal Service proposal. Unfortunately, such an approach would not be productive here. First, PMB competitive providers are in the best position to explain how Federal regulations harm competition, not the Postal Service. Thus, questions to the Postal Service will not expose the extent of these potential anticompetitive effects. Second, the PMB providers best understand how they compete with the Postal Service and are in the best position to question the Postal Service and uncover the details of its changed competitive post office box service product as related to the extent of these anticompetitive effects.

Accordingly, the best course of action is for the Commission to refrain from approving the proposed changes to the competitive post office box service product until these unfair competition issues are resolved. To resolve these issues, the Commission should dismiss the Docket No. C2012-1 complaint without prejudice and allow the

complainants to file a new complaint to examine these anticompetitive issues. This will allow for an appropriate level of discovery and exchange of information between the PMB providers and the Postal Service so that each can make their respective arguments as to whether the changes to the Postal Service's competitive post office box service product is unlawfully anticompetitive.

## VIII. CONCLUSION

For the reasons discussed above, the Public Representative believes that the Postal Service's proposal raises serious issues related to unfair competition. Given these issues, the Public Representative urges the Commission to refrain from approving the proposed changes until those issues are resolved, dismiss the Docket No. C2012-1 without prejudice, and allow the complainants to file a new complaint to examine the merits of these anticompetitive issues.

Respectfully Submitted,

/s/ Robert Sidman

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